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EDUCATION MINNESOTA - DETROIT))	
LAKE EDUCATIONAL SUPPORT)	
PROFESSIONALS,)	
)	
Union,)	
)	ARBITRABILITY OF JOHNSON
and)	DISMISSAL GRIEVANCE
)	
)	
INDEPENDENT SCHOOL DISTRICT)	
NO. 22, DETROIT LAKES,)	
)	BMS CASE NO. 13-PA-0898
Employer.)	
)	

Union has no contractual basis to challenge her termination. The parties have agreed to submit the arbitrability issue for determination without a hearing based upon the written arguments of the parties.

ISSUE

Is the Union's grievance challenging the dismissal of Christy Johnson arbitrable?

RELEVANT STATUTORY, REGULATORY, & CONTRACT LANGUAGE

Minn. Stat. § 179A.04, subd. 3(8)

[The commissioner shall] adopt, subject to chapter 14, a grievance procedure that fulfills the purposes of section 179A.20, subdivision 4, that is available to any employee in a unit not covered by a contractual grievance procedure;

Minn. Stat. § 179A.20, subd. 4(a)

All contracts must include a grievance procedure providing for compulsory binding arbitration of grievances including all written disciplinary actions. If the parties cannot agree on the grievance procedure, they are subject to the grievance procedure promulgated by the commissioner under section 179A.04, subdivision 3, clause (h).

Minn. Rules

5510.5120 APPLICATION

Parts 5510.5110 to 5510.5190 are applicable when a public employer and an exclusive representative of public employees have not reached agreement on or do not have access to a contract grievance procedure as required by Minnesota Statutes, section 179A.20, subdivision 4.

5510.5130 DEFINITIONS

Subp. 4. **Employee.** "Employee" means any public employee who is employed in a position that is part of an appropriate unit for which an exclusive representative has been certified under Minnesota Statutes section 179A.12.

Subp. 5. **Grievance.** "Grievance" means a dispute or disagreement regarding the application or interpretation of any term of a contract required under Minnesota Statutes, section 179A.20, subdivision 1. If no contract exists between the exclusive representative and the employer, "grievance" means a dispute or disagreement regarding

the existence of just cause in the discipline of any employee or the termination of nonprobationary employees.

MASTER AGREEMENT JULY 1, 2011 THROUGH JUNE 30, 2013

ARTICLE XI DISCIPLINE, DISCHARGE, AND PROBATIONARY PERIOD

Section 1. Probationary Period: An employee shall serve a probationary period of six (6) months of active and continuous service, excluding summer break, in the School District, during which time the School District shall have the unqualified right to suspend without pay, discharge, or otherwise discipline such employee. During the probationary period, the employee shall have no recourse to the grievance procedure insofar as suspension, discharge, or other discipline is concerned.

* * *

Section 4. Discipline: The School District shall have the right to impose discipline on its employees for just cause. . . .

FACTUAL BACKGROUND

The School District initially hired the grievant, Christy Johnson, as a substitute special education paraprofessional for the period of September 6, 2012 through October 5, 2012. On October 8, 2012, the School Board appointed Ms. Johnson to a position as a special education paraprofessional at Rossman Elementary School, effective September 27, 2012, running through the end of the 2012-13 school year.

On January 18, 2013, Ms. Johnson was supervising a cognitively impaired student in a school hallway. A parent-volunteer observed an interaction between Ms. Johnson and the student that the parent-volunteer believed involved an inappropriate use of physical force. The parent-volunteer reported the incident, and the School District placed Ms. Johnson on paid administrative leave. The School District then undertook an investigation and found the report to be substantiated. Superintendent of Schools Doug Froke provided Ms. Johnson with written

notice, dated February 13, 2013, of the School District's intent to terminate her employment. The School Board took formal action to effectuate that recommendation on March 11, 2013.

The School District also reported the alleged incident to the Minnesota Department of Education. The Department did not undertake its own investigation but determined that "the reported conduct did not meet the definition of maltreatment."

The Union attempted to grieve Ms. Johnson's discharge under the default grievance procedure promulgated by the Bureau of Mediation Services (BMS) in Minn. Rules Part 5510. The School District denied that request, maintaining that the BMS grievance procedure was inapplicable because, at the time of her termination, Ms. Johnson was an at-will employee and the terms and conditions of her employment were not then governed by any collective bargaining agreement.

The BMS certified the Union as the exclusive representative for a unit consisting of the School District's paraprofessional employees on May 26, 2011. The Union and the School District, however, did not conclude a collective bargaining agreement until October 14, 2013. That agreement provided for pay increases retroactive to July 1, 2011. The agreement also provides for a just cause limitation on discipline for employees who have completed a six-month post-hire probationary period.

POSITIONS OF THE PARTIES

School District

The School District contends that this grievance is not arbitrable because arbitration generally is a matter of contract and no provision of a collective bargaining agreement commits the parties to participate in arbitration or otherwise limits the School District's authority to determine the status of Ms. Johnson's employment. The School District also alleges that the

default BMS grievance procedure is inapplicable in the absence of a collective bargaining agreement that is subject to interpretation. The School District further argues that even if the BMS rules are construed to provide for arbitration subject to a just cause standard, those rules are inconsistent with statute and cannot stand.

Union

In support of its claim of arbitrability, the Union first alleges that courts have long recognized a presumption in favor of finding arbitral jurisdiction. The Union claims that such arbitrability exists with respect to this dispute by virtue of the default BMS grievance procedure which applies when the parties have not reached agreement or do not have access to a contractual grievance procedure. The Union additionally claims that the grievance would be arbitrable if the parties' 2011-2013 agreement were applied to this dispute.

DISCUSSION AND OPINION

Arbitrability

The BMS Rules

The Union's principal contention is that the BMS rules provide the Union and Ms. Johnson with access to arbitration and a just cause standard in the context of this dispute. The Union interprets the BMS rules as applicable to any disciplinary matter arising after the certification of an exclusive representative where the parties have not negotiated a collective bargaining agreement providing for a grievance procedure applicable to disciplinary measures. The School District, in contrast, contends that the BMS procedure applies only if the parties have negotiated a collective bargaining agreement, but the negotiated agreement does not contain a grievance procedure.

The starting point for analysis is the language of the relevant BMS rules. Minn. Rules 5510.5120 explains that this part implements Minn. Stat. § 179A.20, subd.4 which provides that the BMS is to promulgate a grievance procedure for employees in a unit that is not covered by a contractual grievance procedure. The BMS rules provide for a multi-step procedure for the resolution of the "grievances" for covered "employees" that culminates in binding arbitration. Minn. Rule 5510. 5170. Rule 5510.5310, subp. 4 defines a covered "employee" as "any public employee who is employed in an appropriate unit for which an exclusive representative has been certified under Minnesota Statutes, section 179A.12." Meanwhile, subp. 5 states that "if no contract exists between the exclusive representative and the employee, "grievance" means "a dispute or disagreement regarding the existence of just cause in the discipline of any employee or the termination of nonprobationary employees."

While both parties assert plausible interpretations of the rules in question, the Union's construction is more consistent with the plain language of the rules for several reasons.

First, Minn. Rule 5510.5110 states that "Parts 5510.5110 to 5510.5190 are to be liberally construed so as to effectuate the purpose of Minnesota Statutes, chapter 179A, the Public Employment Labor Relations Act." In this regard, PELRA states that all "contracts must include a grievance procedure providing for compulsory binding arbitration of grievances including all written disciplinary actions," Minn. Stat. § 179A.20, subd. 4, and that the BMS commissioner is charged with the duty to adopt a procedure for "any employee in a unit not covered by a contractual grievance procedure," Minn. Stat. § 179A.04, subd. 3(8). By its terms, the latter statutory provision applies to "any employee in a unit not covered by a contractual grievance procedure" without regard to whether the parties have negotiated a contract applicable to other terms and conditions of employment.

Second, Minn Rules 5510.5120 provide that the BMS grievance procedure is applicable "when a public employer and an exclusive representative of public employees have not reached agreement on or do not have access to a contract grievance procedure as required by Minnesota Statutes, section 179A.20, subdivision 4." This language plainly indicates that the BMS procedure is not limited solely to situations in which the parties have negotiated a contract that does not contain a grievance procedure, but extends also to other situations in which employees "do not have access to a contract grievance procedure" providing for binding arbitration.

Third, Minn Rules 5510.5130, in defining a "grievance," states that "if no contract exists between the exclusive representative and the employer, the term "grievance" means "a dispute or disagreement regarding the existence of just cause in the discipline of any employee or the termination of nonprobationary employees." Since this rule applies where "no contract exists," it clearly applies in the absence of a negotiated agreement.

The plain meaning of these rules is that an employee in a unit represented by an exclusive representative has the right to invoke the BMS grievance procedure in the event that they are not covered by a negotiated grievance procedure regardless of the existence of a collective bargaining agreement addressing other terms and conditions of employment. Here, Ms. Johnson was represented by an exclusive representative but was not subject to a negotiated grievance procedure. Under these circumstances, the BMS grievance procedure applies and the Union's grievance on behalf of Ms. Johnson is arbitrable.

Statutory Authorization

As a second arbitrability objection, the School District contends that the BMS rules, if applicable to this grievance, exceed statutory authorization. More particularly, the School District argues that PELRA cannot be read "as creating a substantive right to challenge a

discharge 'for cause' through grievance arbitration when no contract exists . . . " School District brief at 10.

As a preliminary matter, I am reluctant as a labor arbitrator to rule on the issue of whether an administrative rule exceeds statutory authorization. This is an issue on which the appellate courts have more expertise.

But I also decline this invitation to invalidate the BMS rules because, as a matter of substance, I believe that they are consistent with the provisions of PELRA. Section 179A.20, subd. 4(a) of PELRA provides that:

All contracts must include a grievance procedure providing for compulsory binding arbitration of grievances including all written disciplinary actions. If the parties cannot agree on the grievance procedure, they are subject to the grievance procedure promulgated by the commissioner under section 179A.04, subdivision 3, clause (h).

Minn. Stat. § 179A. 04, subd. 3 implements that provision by requiring the BMS commissioner to adopt "a grievance procedure that fulfills the purposes of section 179.20, subdivision 4, that is available to any employee in a unit not covered by a contractual grievance procedure." These statutory provisions, accordingly, charge the BMS commissioner with the obligation to promulgate a regulatory procedure that provides "for compulsory arbitration of grievances including all written disciplinary actions" to be "available to any employee in a unit not covered by a contractual grievance procedure." The BMS rules cited above precisely implement that mandate.

The only plausible basis for challenging the BMS rules is because they provide for a "just cause" standard for testing disciplinary decision in arbitration. The School District argues that Ms. Johnson was an at-will employee at the time of her discharge and that nothing in PELRA commands a just cause limitation on discharge in the absence of a negotiated agreement providing for such a standard.

The School District certainly is correct in asserting that a just cause limitation on discharge rights is generally a right established by contract rather than by statute. *See Alexandria Housing and Redevelopment Authority v. Rost*, 756 N.W.2d 896 (Minn. Ct. App. 2008). In this instance, however, the legislature instructed the BMS to adopt a default system of compulsory arbitration. Such a system necessarily requires some substantive standard. The legislature clearly did not contemplate an "at will" standard since such a test would leave nothing to arbitrate. In contrast, the BMS decision to adopt a "just cause" standard replicates prevailing labor standards. A leading study of collective bargaining agreements, for example, indicates that 94% of such agreements provide that an employer may discharge a covered employee only with "just cause." Roger I. Abrams & Dennis R. Nolan, *Toward a Theory of "Just Cause" in Employee Discipline Cases*, 1985 DUKE L.J. 594, n. 1. Under the circumstances, it is difficult to see how the BMS could have exceeded its statutory authority by adopting the prevailing labor standard for discharge in conjunction with implementing a mandated system of compulsory arbitration.

AWARD

The grievance is arbitrable.

Dated: April 25, 2014

Stephen F. Befort
Arbitrator